

1 BRANDY THOMPSON CODY (SBN 196923)
2 Email: bcody@fisherphillips.com
3 FISHER & PHILLIPS LLP
4 4747 Executive Dr., Suite 1000
5 San Diego, CA 92121-3113
6 Phone Number: (858) 597-9600
7 Fax Number: (858) 597-9601

6 SEAN F. DALEY (SBN 272493)
7 Email: sdaley@fisherphillips.com
8 FISHER & PHILLIPS LLP
9 444 S Flower Street, Suite 1500
Los Angeles, California 90071
Telephone: (213) 330-4500
Facsimile: (213) 330-4501

10 Attorneys for Defendant
FEDEX GROUND PACKAGE SYSTEM, INC.

16 PHILIP DOLAN, individually and on behalf of
others similarly situated,

Plaintiff,

19 v.
20 FEDEX GROUND PACKAGE SYSTEM, INC.,
a Delaware corporation; and DOES 1 through
100, inclusive

Defendant

Case No. 5:18-cv-06934-BLF

**DEFENDANT FEDEX GROUND
PACKAGE SYSTEM, INC.'S NOTICE
OF MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: November 4, 2021
Time: 9:00 a.m.
Judge: Hon. Beth Labson Freeman
Courtroom: San Jose, 5th Floor, Ctrm. 3

Removal: November 15, 2018
Trial Date: August 15, 2022

NOTICE OF MOTION

2 PLEASE TAKE NOTICE that on November 4, 2021, at 9:00 a.m. in Courtroom 3 (5th
3 Floor) of this Court, located at 280 South 1st Street, San Jose, California 95113, FedEx Ground
4 Package System, Inc. (“FedEx Ground”) will and hereby does move for an order granting summary
5 judgment under Rule 56 of the Federal Rules of Civil Procedure.

6 This motion is based upon this Notice of Motion, the accompanying Memorandum of
7 Points and Authorities, the Declaration of Brandy T. Cody, the Request for Judicial Notice, all
8 pleadings and papers on file in this action, and upon such other matters as may be presented to the
9 Court at the time of the hearing.

MOTION AND RELIEF REQUESTED

11 FedEx Ground moves for summary judgment because there is no genuine issue as to any
12 material fact and FedEx Ground is entitled to summary judgment on Plaintiff Philip Dolan's
13 ("Plaintiff") individual and class claims due to Plaintiff's settlement of his claims with his former
14 employer, Josemite IV, Inc.:

15 1. Plaintiff's individual claims are moot because there is no recovery the Court can
16 award Plaintiff—Plaintiff, in return for compensation from his direct employer,
17 released all claims he may have against his employer and FedEx Ground, waived
18 all recovery of attorneys' fees, and waived his ability to represent a class and to
19 participate in a class action.

20 2. Plaintiff's class claims are moot because Plaintiff is not an adequate class
21 representative because Plaintiff expressly waived any ability he may have had to
22 both represent a class and participate in a class action.

23 || Dated: September 30, 2021

FISHER & PHILLIPS LLP

By: /s/ Brandy T. Cody
BRADY T. CODY
SEAN F. DALEY
Attorneys for Defendant
FEDEX GROUND PACKAGE SYSTEM, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT AND RELEVANT FACTS

This lawsuit arises out of Plaintiff's employment as a driver for Josemite IV, Inc. ("Josemite")—an independent business entity with which FedEx Ground contracted for package pick-up and delivery services. Claiming that FedEx Ground was his joint employer with Josemite, Plaintiff seeks to recover overtime pay and unpaid minimum wages under California law, premium pay for missed meal and rest periods, relief under derivative claims for penalties related to separation pay, penalties for non-compliant wage statements, and reimbursement of business expenses. *See* ECF No. 55. Plaintiff also seeks to represent a proposed class defined as follows:

All individuals who were employed as pick-up and delivery truck drivers, or in other similar positions, by Josemite IV, Inc., a contracted service provider that contracted to provide pickup and delivery services for FedEx Ground Package System, Inc., in California during the relevant time period.

See ECF No. 55 at 4.

However, both Plaintiff's individual and class claims fail as a matter of law.¹ On March 8, 2021, Plaintiff and Josemite voluntarily executed a settlement agreement and general release. As part of that agreement, Plaintiff released all of his claims against not only Josemite, but also FedEx Ground:

Releasees are released from all claims and rights of any kind that Plaintiff may have based on any events or circumstances arising or occurring on or before the date of Plaintiff's execution of this Release, whether now known or unknown, suspected or unsuspected, including, without limitation, any claim related to the *Dolan Case*, either as an individual or as a putative class representative, or Plaintiff's work for the Company, Nguyen and/or FedEx.

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¹ FedEx Ground disputes that it could be found to be Plaintiff's joint employer, but does not seek summary judgment on that component of Plaintiff's claims. This motion instead focuses on Plaintiff's lack of standing to assert any claims at all. FedEx Ground reserves the right to assert additional defenses to Plaintiff's claims in the event this matter proceeds for any reason.

1 Request for Judicial Notice, filed and served herewith (hereinafter, “RJN”), ¶ 1, Exhibit 1
2 (Settlement Agreement and General Release).² Plaintiff also agreed “that he has received all wages
3 due and owing to him.” *Id.*, ¶ 1(b). In other words, Plaintiff agreed to release Josemite, Josemite’s
4 owner (Long Nguyen), and FedEx Ground from any and all claims, whether known or unknown,
5 that Plaintiff may have, including any claims Plaintiff may have related to the instant case either
6 as an individual or as a putative class representative, and agreed that he received pay for all unpaid
7 wages.

8 Plaintiff’s release of claims also included any claims for expenses, including attorney’s
9 fees and legal expenses. *See, e.g., id.*, ¶ 1(a) (“The parties agree they shall bear their own costs
10 and attorneys’ fees with respect to any and all claims encompassed by the terms of this Release.”);
11 *id.* ¶ 2 (“Plaintiff agrees this is a General Release, which to the fullest extent permitted by law,
12 waives and releases all claims against the Releasees, including but not limited to . . . expenses
13 (including attorneys’ fees and legal expenses) . . .”). Finally, Plaintiff agreed: “[Y]ou waive any
14 right or ability to be a class or collective action representative or to otherwise participate in any
15 putative or certified class, collective or multi-party action . . .” *Id.*

16 Despite settling with Josemite and releasing his claims against FedEx Ground, Plaintiff has
17 made no attempt to dismiss this action and would not agree to stipulate to dismiss this action,
18 necessitating the instant motion. Declaration of Brandy T. Cody, filed and served herewith
19 (hereinafter, “Cody Decl.”), ¶¶ 2, 4. Plaintiff also failed to file his motion for class certification
20 on May 14, 2021, when it was due. Cody Decl., ¶ 3; *see also* ECF Nos. 62 and 63.

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24 ² Pursuant to Federal Rules of Evidence 902(8), a “document accompanied by a certificate of
25 acknowledgment that is lawfully executed by a notary public” is self-authenticating and requires
26 no extrinsic evidence of authenticity in order to be admitted. The Settlement Agreement and
27 General Release executed by Plaintiff and Josemite’s CEO Long Nguyen was notarized by a
28 California notary public on March 8, 2021.

1 **II. SUMMARY JUDGMENT STANDARD**

2 The “purpose of summary judgment is to pierce the pleadings and to assess the proof in
3 order to see whether there is a genuine need for trial.” *Matsuhita Elec. Indus. Co. Ltd. v. Zenith*
4 *Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). Summary judgment is appropriate
5 where there is “no genuine issue of material fact” and the moving party is “entitled to judgment as
6 a matter of law.” Fed. R. Civ. P. 56(c). When the moving party makes a properly supported
7 summary judgment motion, the nonmoving party “must present affirmative evidence in order to
8 defeat [it].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). “The mere existence of a
9 scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be
10 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

11 **III. LEGAL ARGUMENT**

12 **A. FedEx Ground is Entitled to Summary Judgment on Plaintiff’s Individual**
13 **Claims**

14 The Constitution limits the scope of federal judicial power to designated “cases” and
15 “controversies.” U.S. Const., Art. III, § 2. Thus, federal courts do not have the power to decide
16 questions of law in a vacuum and they may only determine such matters as arise in the context of
17 a genuine “case” or “controversy” within the meaning of Article III. *SEC v. Med. Comm. for*
18 *Human Rights*, 404 U.S. 403, 407 (1972). As such, the federal court has no authority to give
19 opinions upon moot questions. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000).

20 “*A case is moot when the issues presented are no longer ‘live’ or the parties lack a legally*
21 *cognizable interest in the outcome.*” *Id.* The central issue in any mootness challenge is whether
22 the Court can award any meaningful relief. Unless the prevailing party can obtain effective relief,
23 any opinion as to the legality of the challenged action would be advisory. *Id.*; *see also Summers*
24 *v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (no standing where injury is remedied).

25 In *Campbell-Ewald Co. v. Gomez*, the Supreme Court reiterated the constitutional
26 requirement that a case or controversy must exist at all stages of the litigation. 577 U.S. 153 (2016).
27 Specifically, the Court stated that “[i]f an intervening circumstance deprives the plaintiff of a
28 ‘personal stake in the outcome of the lawsuit,’ at any point during litigation, the action can no

1 longer proceed and must be dismissed as moot.” *Id.* (emphasis added).

2 Here, Plaintiff voluntarily settled his claims and agreed to release FedEx Ground from any
3 and all claims, whether known or unknown, that Plaintiff may have, including any claims Plaintiff
4 may have related to the instant case either as an individual or as a putative class representative.
5 This was a voluntary, intervening circumstance depriving Plaintiff of a personal stake in the
6 outcome of the lawsuit. Accordingly, Plaintiff’s individual claims should be dismissed as moot
7 pursuant to the terms of the settlement agreement between Plaintiff and Josemite, as there is no
8 recovery the Court can award to Plaintiff with respect to these claims.

9 **B. Plaintiff’s Class Claims Are Also Moot Because Plaintiff Is Not An Adequate
10 Class Representative**

11 The Supreme Court has long recognized that a named plaintiff cannot represent a putative
12 class absent an individualized injury sufficient to demonstrate the existence of an Article III case
13 or controversy. *See O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (“if none of the named plaintiffs
14 purporting to represent a class establishes the requisite of a case or controversy with the defendants,
15 none may seek relief on behalf of himself or any other member of the class”); *Simon v. Eastern
16 Kentucky Welfare Rights Orgs.*, 426 U.S. 26, 40 n. 20 (1976) (“[t]hat a suit may be a class action
17 . . . adds nothing to the question of standing, for even named plaintiffs who represent a class ‘must
18 allege and show that they personally have been injured, not that injury has been suffered by other,
19 unidentified members of the class to which they belong and which they purport to represent’”)
20 (quotation omitted); *see also, Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013) (“the mere
21 presence of collective-action allegations in the complaint cannot save the suit from mootness once
22 the individual claim is satisfied”). Moreover, a lack of Article III jurisdiction cannot be cured
23 through class certification, as the Federal Rules of Civil Procedure “do not extend or limit the
24 jurisdiction of the district courts.” Fed. R. Civ. P. 82. Thus, Plaintiff’s lack of any injury for his
25 individual claims precludes him from representing a purported class on such claims.

26 The unnamed class members who have not appeared in this action will not be prejudiced
27 by a dismissal of these causes of action. Such a dismissal has no binding effect on the other
28 members of the putative class who have no notice of the action and are not considered parties to it

1 for purposes of res judicata or collateral estoppel. *See Aguilera v. Pirelli*, 223 F.3d 1010, 1013 n.
2 1 (9th Cir. 2000) (“When a motion is maintained against an uncertified class, only the named
3 plaintiffs are affected by the ruling.”); *see also Villagrana v. Graham*, 60 Fed. Appx. 713, 715
4 (10th Cir. 2003); *Chevron U.S.A., Inc. v. Sch. Bd. Yermilion Parish*, 294 F.3d 716, 720 (5th Cir.
5 2002). Indeed, the putative class members are not yet parties because no class has been certified.
6 *See Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (Kagan, J.) (referencing “the novel and surely
7 erroneous argument that a nonnamed class member is a party to the class-action litigation *before*
8 *the class is certified*”) (citation omitted) (emphasis by the Court). The Court therefore need not
9 consider whether it would be proper to certify a class.

10 The recent decision by the Ninth Circuit Court of Appeals in *Brady v. AutoZone Stores, Inc.*, 960 F.3d 1172 (2020), is instructive. In *Brady*, the Ninth Circuit decided the question of what
11 happens when a class representative voluntarily settles only his individual claims without
12 indicating any financial stake in the unresolved class claims. *Brady*, 960 F.3d at 1173. The Court
13 concluded:

14 In sum, we hold that when a class representative voluntarily settles his individual
15 claims, he must do more than expressly leave class claims unresolved to avoid
16 mootness. A class representative must also retain—as evidenced by an
17 agreement—a financial stake in the outcome of the class claims. Absent such a
18 stake, a class representative's voluntary settlement of individual claims renders
class claims moot.

19 *Id.* at 1175.

20 Here, just as in *Brady*, Plaintiff's settlement agreement with Josemite does not indicate he
21 will receive any additional compensation for the class claims. In fact, the settlement agreement
22 Plaintiff agreed to stated that he released “any claim related to the *Dolan* Case, either as an
23 individual or as a putative class representative . . .” RJD, Exhibit 1, ¶ 2 (emphasis added). Plaintiff
24 also expressly gave up “any right or ability to be a class or collective action representative or to
25 otherwise participate in any putative or certified class, collective or multi-party action or
26 proceeding . . .” *Id.* at ¶ 2. Moreover, Plaintiff agreed several times in the Settlement Agreement
27 that he released all claims for “expenses (including attorneys' fees and legal expenses).” *Id.* at ¶ 2.
28 While Plaintiff may not have resolved the class claims, he certainly did not retain any financial

1 stake in them. There is no basis on which to allow Plaintiff, after his claims have been mooted, to
2 seek to represent the putative class of which he is not a member and for which he agreed not only
3 to not represent, but also to not participate. Accordingly, as in *Brady*, those class claims are moot
4 and should be dismissed.

5 **IV. CONCLUSION**

6 For the reasons stated above, FedEx Ground respectfully requests that the Court grant
7 FedEx Ground summary judgment on all of Plaintiff's claims.

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9 Dated: September 30, 2021

FISHER & PHILLIPS LLP

10 By: /s/ Brandy T. Cody

11 BRADY T. CODY

12 SEAN F. DALEY

13 Attorneys for Defendant

14 FEDEX GROUND PACKAGE SYSTEM, INC.

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